

**RICHARDS, LAYTON & FINGER**

A PROFESSIONAL ASSOCIATION

ONE RODNEY SQUARE

920 NORTH KING STREET

WILMINGTON, DELAWARE 19801

(302) 651-7700

FAX (302) 651-7701

WWW.RLF.COM

JEFFREY L. MOYER  
DIRECTOR

DIRECT DIAL NUMBER  
302-651-7525  
MOYER@RLF.COM

April 27, 2007

**VIA E-FILING and HAND DELIVERY**

The Honorable Joseph J. Farnan, Jr.  
United States District Court  
J. Caleb Boggs Federal Building  
844 King Street  
Wilmington, DE 19801

**Re: Solae LLC v. Hershey Canada Inc., C.A. No. 07-140-JJF**

Dear Judge Farnan:

Hershey Canada Inc. ("Hershey Canada") respectfully submits this letter to supplement the record on its motion to dismiss the complaint in the above-referenced action. The materials submitted with this letter were filed by the plaintiff Solae, LLC ("Solae") in the concurrently pending action in Ontario, Canada *after* Hershey Canada filed its motion in this case. Hershey Canada submits this material both so that the Court will have a complete record for considering Hershey Canada's motion to dismiss and so that Solae will have the opportunity to consider and address the complete record in its opposition to Hershey Canada's motion, which is not due to be filed until next week.

Hershey Canada specifically supplements its motion with the following documents, which are attached to this letter:

1. Solae's Notice of Motion filed in Ontario on April 23, 2007 (attached hereto as Exhibit A); and
2. The supporting affidavit of Laurie Cradick, a Solae executive, dated April 19, 2007, and accompanying exhibits (attached hereto as Exhibit B).

These materials warrant the Court's consideration not only because they contain important factual information bearing on Solae's claim that Delaware is an appropriate forum for this case, but also because they contain admissions that contradict the key forum-related allegations in Solae's complaint and make clear that Solae's complaint is in error in critical respects.

Specifically, Solae's Canadian filing confirms three errors or omissions in the Delaware complaint relating to this Court's jurisdiction:

The Honorable Joseph J. Farnan, Jr.  
April 27, 2007  
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**First, Solae's reverse-side terms were not sent with its order confirmation.** In its complaint in this case, Solae alleged that "[o]n or about June 22, 2006, Solae transmitted an order confirmation to Hershey" that "contains conditions of sale, setting forth the terms that would govern the transaction." (Compl. ¶ 10.) In its filing in Ontario, however, Solae makes clear, through the affidavit of Ms. Cradick, that the order confirmation in question consisted of a one-sided, one-page fax that did not contain any terms and conditions relating to forum selection, choice of law, or any of Solae's other reverse-side terms. (See Cradick Aff. ¶ 22; Ex. 4 to Cradick Aff.)

**Second, Solae's reverse-side terms were not included in the shipping documents.** Solae also alleged in its Delaware complaint that "[i]ncluded with Solae's shipment of Lot 1 was an invoice, again containing the Conditions of Sale." (Compl. ¶ 16.) In Ontario, however, Ms. Cradick's affidavit and accompanying exhibits clearly indicate that none of the shipping documents arriving with this delivery contained any of the reverse-side terms and conditions in question. (Cradick Aff. ¶ 23; Ex. 5 to Cradick Aff.)

**Third, the only attempt Solae made to send Hershey Canada its terms came after Hershey Canada had received the goods.** Although Solae did not mention it in its Delaware complaint (and instead relied on the erroneous allegations that it had sent its terms with the confirmation and shipping documents), the most that Solae claims in its Canada filing is that it mailed a form invoice with reverse-side boilerplate terms that Hershey Canada received *after* Solae delivered the goods to Hershey Canada. (See Cradick Aff. ¶ 24; Ex. 6 to Cradick Aff.) Such terms, transmitted unilaterally by Solae and received only after the goods were received, cannot be construed as part of the parties' contract.

In light of Solae's admissions in the Canada court, it is clear both that there are material mistakes in Solae's complaint relating to key issues in the case and that the sole basis for Solae's attempt to secure this forum is in error. For these reasons and the reasons previously set out in Hershey Canada's motion, Hershey Canada respectfully requests that this case be dismissed in favor of the pending litigation in Ontario, Canada.

Respectfully submitted,

  
Jeffrey L. Moyer (#3309)

JLM/th

Enclosures

cc: P. Clarkson Collins, Jr., Esq.  
Katherine J. Neikirk, Esq.  
Scott L. Windelman, Esq.  
Monica M. Welt, Esq.

# EXHIBIT A

Court File No.: 07-CV-329291PD2

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**HERSHEY CANADA, INC.**

Plaintiff

- and -

**SOLAE, LLC**

Defendant

**NOTICE OF MOTION**

The defendant, Solae, LLC ("Solae"), will make a motion to a judge on Friday, the 3<sup>rd</sup> day of August, 2007 at 10:00 a.m., or as soon thereafter as this matter can be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**PROPOSED METHOD OF HEARING:**

The motion is to be heard orally.

**THE MOTION IS FOR:**

1. An Order staying or dismissing this action;
2. In the alternative, an order extending the time for delivery of Solae's statement of defence until thirty days following the final determination of this motion proceeding;
3. Solae's costs of this motion fixed on an appropriate scale; and
4. Such further and other relief as this Honourable Court deems just.

**THE GROUNDS FOR THIS MOTION ARE:**

1. Another proceeding is pending between the same parties in respect of the same subject-matter. Shortly before the plaintiff, Hershey Canada Inc. ("Hershey Canada"), commenced this action, Solae commenced a legal proceeding against Hershey Canada in the State of the Delaware in respect of the same subject-matter as in this action. Therefore, this Honourable Court should decline jurisdiction over this action to avoid a multiplicity of proceedings;

2. The State of Delaware in the United States of America is clearly more appropriate than Ontario for the conduct of this action, for various reasons including the following:

- (a) The parties have contractually agreed that the courts of the State of Delaware in the United States of America have exclusive jurisdiction over the subject-matter of this action and that the laws of the State of Delaware should apply;
- (b) Solae is a corporation organized pursuant to the laws of the State of Delaware;
- (c) This action relates to a sale of soy lecithin by Solae to Hershey Canada. This sale transaction stemmed from an underlying supply and pricing agreement for soy lecithin that was made in the United States between Solae and Hershey Canada's parent corporation, The Hershey Company, for application to both Hershey and Hershey Canada.
- (d) Hershey is a corporation incorporated pursuant to the laws of the State of Delaware.
- (e) In this action, the plaintiff alleges that Solae's soy lecithin product was contaminated with salmonella at the time that the plaintiff received it from Solae.

Thus, primary matters in issue relevant to liability will include the manner in which Solae produced, tested, packaged and shipped the soy lecithin product. Solae produced, tested and packaged the soy lecithin at its facilities in the United States, and Solae shipped the soy lecithin to the plaintiff from its plant in the U.S.;

- (f) Most or all of the evidence relevant to those matters is in the U.S., and most of the relevant witnesses reside in the U.S.;
- (g) Some of these relevant witnesses are not in the employ of Solae. Accordingly, Solae would have no ability to compel the physical attendance of these witnesses at a trial before a court in Ontario;
- (h) The conduct of this action in Ontario would increase the cost of litigation since, among other things, the parties would be required to adduce expert evidence on the laws of the State of Delaware if this action were tried in Ontario;
- (i) Solae accepts the jurisdiction of the United States District Court for the District of Delaware over the subject-matter of this action;
- (j) The pre-trial discovery rules of the United States District Court for the District of Delaware are substantially broader than the pre-trial discovery rules in Ontario. Given the nature of the issues raised in this action, this difference constitutes a legitimate juridical advantage in favour of the State of Delaware.

- 3. Rules 1.04(2), 17.06, 21.01(3)(c), and 37 of the Rules of Civil Procedure;
- 4. Section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and

5. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of this motion:

1. The Affidavit of Laurie Cradick, sworn April 19, 2007;
2. The Affidavit of Edward M. McNally sworn April 20, 2007; and
3. Such further and other evidence as counsel may advise and this Honourable Court may permit.

April 23, 2007

**FASKEN MARTINEAU DuMOULIN LLP**  
Barristers & Solicitors  
66 Wellington Street West  
Suite 4200, Toronto Dominion Bank Tower  
P.O. Box 20, Toronto-Dominion Centre  
Toronto, Ontario M5K 1N6  
**Robert S. Harrison** (LSUC#14046D)  
Tel: 416 865 4384  
**Peter J. Pliszka** (LSUC#29634T)  
Tel: 416 868 3336  
Fax: 416 364 7813  
Solicitors for the Defendant

**TO: McMILLAN BINCH MENDELSON LLP**  
Barristers & Solicitors  
BCE Place, Suite 4400  
Bay Wellington Tower  
181 Bay Street  
Toronto, Ontario M5J 2T3  
**Scott Maidment** (LSUC #33797R)  
Tel: 416 865 7911  
**Teresa Dufort** (LSUC#23677J)  
Tel: 416 865 7145  
Fax: 416 865 7048  
Solicitor for the Plaintiff

# EXHIBIT B



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Court File No.: 07-CV-329291PD2

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**HERSHEY CANADA, INC.**

Plaintiff

- and -

**SOLAE, LLC**

Defendant

**AFFIDAVIT OF LAURIE CRADICK  
(sworn April 19, 2007)**

I, LAURIE CRADICK, of the City of St. Louis, Missouri, in the United States of America, MAKE OATH AND SAY:

1. I have been employed by the defendant, Solae, LLC ("Solae") and one of its predecessor companies since December 1999. Since October 1, 2006, I have been in the position of Director of Sales - North America. Prior to that, I was an Account Manager - Lecithin Division. As Account Manager - Lecithin Division I was responsible for Solae's sales of soy lecithin products to, and customer relationship with, The Hershey Company ("Hershey"). I have knowledge of the matters to which I hereinafter depose, except for those matters that I have stated in this affidavit are based on information provided to me by others, all of which information I believe to be true.

**PURPOSE AND SUMMARY OF THIS AFFIDAVIT**

2. The plaintiff, Hershey Canada, Inc. ("Hershey Canada"), has commenced this action in Ontario. Hershey Canada alleges that soy lecithin, which was supplied by Solae in late

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September 2006 and used by Hershey Canada in its production of chocolate products, was contaminated with salmonella.

3. Solae is applying for an order staying this action. It is Solae's position that the Ontario Superior Court should stay this action because there is another proceeding pending between the same parties in respect of the same subject-matter in the State of Delaware, and the State of Delaware is a clearly more appropriate forum for the hearing and determination of the issues raised in this action.

4. Shortly before Hershey Canada issued its statement of claim in this action, Solae had already issued a Complaint before the United States District Court for the District of Delaware for various declarations relevant to the issues between the parties in this action. Attached hereto as Exhibit "1" is a copy of Solae's Complaint, issued in Delaware on March 9, 2007. Attached hereto as Exhibit "2" is a copy of Hershey Canada's statement of claim in this action, issued on March 12, 2007.

5. Further, as particularized below, the parties have contractually agreed that the courts of Delaware have exclusive jurisdiction over any disputes or issues arising under the sale agreement in question in this action and that the laws of Delaware govern the parties' rights and obligations; the subject sale of soy lecithin to Hershey Canada arose from a prior underlying supply and pricing agreement that was made in the U.S. between Solae and Hershey; and much of the evidence relevant to primary issues in this action is located in the U.S., and many relevant witnesses reside in the U.S.

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**THE PARTIES**

6. Solae is a limited liability corporation organized pursuant to the laws of the State of Delaware, in the United States of America.

7. Solae was formed effective April 1, 2003. Solae is the successor corporation of Protein Technologies International Inc. In connection with its formation, Solae also acquired and succeeded to all of the soy protein and lecithin business and assets of Central Soya Company Inc. ("Central Soya"), which included the recently acquired soy protein business and lecithin assets of Bunge Limited.

8. Solae's global corporate headquarters, and research and development headquarters are in St. Louis, Missouri. Solae has several manufacturing plants in the U.S. Solae does not have any manufacturing plants in Canada. Solae also does not have any commercial offices in Canada (Solae has one employee – a sales manager in its soy protein division, as opposed to the soy lecithin division – who works out of his home office in Stouffville, Ontario).

9. Solae manufactures a range of soy-ingredient products including textured vegetable proteins, textured and functional soy concentrates, soy protein isolates, specialty lecithins and polymers, which Solae sells to commercial users.

10. The plaintiff, Hershey Canada, is a wholly-owned subsidiary of Hershey. Hershey's corporate headquarters is in Hershey, Pennsylvania. Hershey Canada's office is in Mississauga, Ontario.

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**BUSINESS RELATIONSHIP BETWEEN SOLAE AND HERSHEY**

11. Hershey has been a customer of Solae and Central Soya since the early 1990s. Over the years, Central Soya and Solae have sold various soy-based products to Hershey.

12. For most of the time between December 1999 and October, 2006, I was the account manager responsible for Central Soya's, and subsequently Solae's (after April 1, 2003), sales of soy lecithin products to Hershey. Solae's soy lecithin products were used by various confectionary manufacturing facilities operated by Hershey and its subsidiaries, including Hershey Canada.

13. For the entire time that I was responsible for the Hershey account, Hershey's purchasing department in Hershey, Pennsylvania, negotiated the underlying agreements for the purchase of Solae's soy lecithin products for itself and its subsidiary, Hershey Canada. Typically, on an annual basis I would meet with Hershey's representatives at Hershey's offices in Pennsylvania to negotiate the projected aggregate volume of soy lecithin products that would be ordered by manufacturing plants of Hershey and Hershey Canada over the course of the next year, and the price that would apply to those purchases.

14. Once such a supply-pricing agreement was in effect, various manufacturing facilities of Hershey and Hershey Canada would then send purchase orders to Solae (and previously Central Soya) from time to time to trigger specific shipments of soy lecithin by Solae pursuant to the supply-pricing agreement.

**SOLEC™ SUPPLY AGREEMENT FOR 2006**

15. One of the Solae products that I sold to Hershey was SOLEC™ 3 F-UB-IP ("SOLEC"). SOLEC is "an identity preserved" product, which means that it is a non-genetically modified soy lecithin. Central Soya developed SOLEC in 2002 and 2003. (Originally, the brand

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name was "Centrol 3 F-UB-IP", but the name was changed to SOLEC in or about 2005. Throughout this affidavit, this product will be referred to as "SOLEC".)

16. In 2002 or 2003, I presented SOLEC to Hershey's representatives in Hershey, Pennsylvania for its consideration. Hershey and Hershey Canada began to purchase SOLEC in or about 2003.

17. In or about late 2005, I had discussions with Kim McLucas of Hershey's purchasing department to negotiate the agreement for supplying Solae's soy lecithin products, including SOLEC, for Hershey and Hershey Canada manufacturing plants in 2006. As far as I can recall, these discussions were conducted by telephone.

18. Ms. McLucas and I negotiated the projected volume of soy lecithin products, including SOLEC, that would be ordered by manufacturing plants of Hershey and Hershey Canada during 2006, and the sale price that would apply during that period.

19. Specifically with respect to SOLEC, in about mid-December, 2005, Ms. McLucas and I agreed that for the period from January 1, 2006 to December 31, 2006 Hershey Canada would order up to 250,000 pounds of SOLEC at a price of US\$1.2565 per pound (the "SOLEC Supply Agreement"). As far as I am aware, Solae's standard sale terms would apply to these sales under the SOLEC Supply Agreement. Consistent with past business practice with Hershey, the agreed arrangement was that throughout 2006, Hershey Canada would send Solae purchase orders to trigger the shipment of SOLEC, and in response Solae would ship SOLEC to the Hershey Canada manufacturing plant at the above-noted price to which Hershey had agreed on behalf of Hershey Canada.

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**SUPPLY OF SOLEC TO SMITH FALLS PLANT**

20 Pursuant to the SOLEC Supply Agreement, on or about June 21, 2006, Hershey Canada's manufacturing plant in Smith Falls, Ontario sent Solae a purchase order for 39,682.8 pounds of SOLEC at the price of US\$1.2565 per pound, in accordance with the SOLEC Supply Agreement.

21. A copy of Hershey Canada's purchase order dated June 21, 2006 (the "Purchase Order") is attached hereto as **Exhibit "3"**. The Purchase Order was faxed to Solae's Customer Service department at Solae's headquarters in St. Louis, Missouri. The fax transmission line at the top of the Purchase Order appears to indicate that this fax transmission included a second page. Solae's Customer Service file relating to Hershey does not contain a copy of any other page that accompanied this Purchase Order. I did not see the fax when it was received, and I do not know what other page may have been faxed to Solae. Laura Titus, who was the Solae customer service representative, who received, processed and filed the Purchase Order, has told me that she cannot recall what other page came by fax with the Purchase Order.

22. Ms. Titus has told me that after she verified that the quantity of SOLEC stated in the Purchase Order was available for the stated delivery date and confirmed that the price corresponded to the SOLEC Supply Agreement, Ms. Titus then faxed to Hershey Canada's Smith Falls plant a document entitled "Order Confirmation 234910" (the "Order Confirmation") on June 22, 2006. A copy of the Order Confirmation is attached as **Exhibit "4"**.

23. Solae manufactured the ordered quantity of SOLEC at Solae's manufacturing plant in Gibson City, Illinois (the "Gibson City Plant"). On or about September 27, 2006, the supply of SOLEC was shipped from the Gibson City Plant to Hershey Canada's manufacturing plant in Smith Falls. Attached as **Exhibit "5"** are copies of Solae's delivery documents which

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accompanied the shipment, comprising the Straight Bill of Lading Short Form, the Delivery Note No. 80290104 and two Certificates of Analysis, one in respect of each of the two batches of SOLEC that were shipped.

24. Upon shipping the SOLEC product to Smith Falls, Solae sent the invoice for this sale by mail. Lisa Affunti, who works in Solae's accounting department in St. Louis, has informed me that on or about September 27, 2006 she printed Solae Invoice No. 90308495 (the "Invoice"), inserted the Invoice into an envelope and posted that envelope for mailing to Hershey Canada's Smith Falls plant. The Invoice is double-sided. The reverse side of the Invoice is headed "Attachment 1 - Conditions of Sale", and it lists 18 terms that applied to this sale of SOLEC. Ms. Affunti has told me that those "Conditions of Sale" were printed on the reverse side of the Invoice. Ms. Affunti said that her standard procedure is to check twice that the Conditions of Sale are printed on the reverse side of each invoice--once when she takes the invoices from the computer printer tray, and again when she folds and inserts the invoices into mailing envelopes. A copy of the Invoice, including the reverse side that sets out the conditions of sale, is attached as Exhibit "6".

#### GOVERNING JURISDICTION AND LAW CLAUSES

25. Clause 17 of the Conditions of Sale listed on the reverse side of the Invoice states as follows:

17. This Agreement is to be construed and the respective rights of Buyer and Seller are to be determined according to the laws of the State of Delaware, USA, without regard to choice of law or conflicts principles of Delaware or any other jurisdiction, and the courts of Delaware shall have exclusive jurisdiction over any disputes or issues arising under this Agreement. The United Nations Convention on Contracts for the International Sale of Goods shall not govern this Agreement or the performance thereof or any aspect of any dispute arising therefrom. (Emphasis added)

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26. Clause 18 of the Conditions of Sale states as follows:

18. This Agreement contains all of the terms and conditions with respect to the purchase and sale of the Products sold hereunder. These terms and conditions supersede any of previous date and no modification thereof shall be binding on Seller unless separately contracted in writing and agreed to by a duly authorized representative of Seller. No modification shall be effected by the acknowledgement or acceptance of purchase order forms stipulating different conditions. Unless Buyer shall notify Seller in writing to the contrary as soon as practicable after receipt of this Agreement by Buyer, Buyer shall be deemed to have accepted the terms and conditions hereof and, in the absence of such notification, Buyer's acceptance of the Products shall be equivalent to Buyer's assent to the terms and conditions hereof. (Emphasis added)

27. Hershey Canada accepted the shipment of SOLEC, and paid the price stated on the Invoice. Attached as Exhibit "7" is a copy of a cheque dated October 27, 2006 in the amount of U.S.\$49,861.80 that was received from Hershey Canada as payment in full of the Invoice.

28. Neither Hershey nor Hershey Canada ever expressed any objection to me about any of the Conditions of Sale set out on the reverse side of the Invoice. I understand from Lisa Affunti that the Conditions of Sale have been set out on Solae's invoices for the sale of SOLEC and other soy-based products to Hershey and Hershey Canada since about 2003. No one at Hershey or Hershey Canada has ever previously expressed to me any objection to the applicability of any of those Conditions of Sale at any time in the past.

29. Further, Laura Titus in Customer Service and Lisa Affunti in Accounting have told me that no one from Hershey Canada or Hershey ever expressed any objection to either of them about any of those Conditions of Sale, in connection with either the Invoice dated



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September 27, 2006 or any prior sale transaction. Beyond that, I have never heard from anyone else at Solae of any instance where Hershey or Hershey Canada objected to any of those Conditions of Sale.

#### LOCATION OF EVIDENCE AND WITNESSES RELEVANT TO ISSUES IN ACTION

30. According to the allegations in Hershey Canada's statement of claim, the Smith Falls plant used the September, 2006 supply of SOLEC in the production of chocolate in mid to late October. Subsequently, Hershey Canada allegedly discovered salmonella in its chocolate. Hershey Canada alleges it conducted testing to identify the source of the salmonella, and Hershey Canada alleges that the testing revealed that SOLEC was the source of the salmonella. Hershey Canada alleges it then ceased production of chocolate at its Smith Falls plant, shut down operations at the plant, and conducted a recall of chocolate products that had been manufactured at the plant.

31. Hershey Canada alleges in paragraph 18 of the statement of claim that the SOLEC was contaminated with salmonella at the time that it was shipped by Solae in late September 2006. Thus, Hershey Canada alleges that Solae breached contractual obligations. Further, Hershey Canada alleges in paragraph 20 of the statement of claim that Solae was negligent by permitting the introduction of salmonella into the SOLEC and failing to detect the presence of salmonella in the SOLEC.

32. Jack Self, who is Global Director of Lecithin of Solae, has informed me that Solae denies all liability for the claims advanced by Hershey Canada. John Hoffman, who is Associate Director of Quality Assurance of Solae, has informed me that Hershey Canada's allegations that the SOLEC was contaminated at the time of delivery to the Smith Falls plant and that Solae was

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negligent in failing to detect the salmonella, raise issues respecting most or all of Solae's processes of production, testing and shipment of this SOLEC, such as:

- (a) The importation from Brazil of the base lecithin that was used by Solae for the manufacture of SOLEC;
- (b) the manner in which the base lecithin was shipped to Solae's Gibson City Plant in Illinois, and any storage of the soy bean pending production;
- (c) the manner in which SOLEC was manufactured at Solae's Gibson City Plant;
- (d) the steps that were taken by Solae to maintain appropriately hygienic conditions in its Gibson City Plant;
- (e) the testing and quality assurance processes that were undertaken by Solae in Gibson City and/or St. Louis in respect of the SOLEC; and
- (f) the manner in which the SOLEC was sealed in containers and shipped from Gibson City, Illinois to Smith Falls.

33. Mr. Hoffman has informed me that most, if not all, of the evidence relevant to those issues is situated in the U.S. For example, Solae's physical facilities as well as all documents relating to those operations are in the U.S. Similarly, all of the witnesses who would be in a position to give evidence relating to those matters are employees of Solae who reside in the U.S. Mr. Hoffman has informed me that he estimates that from five to ten Solae employees would likely be required to give evidence regarding the above-noted matters at a trial of this action. (Mr. Self and Mr. Hoffman are employed at Solae's headquarters in St. Louis, and reside in or near St. Louis.)

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34. In addition to those witnesses, I believe that the following individuals, who reside in the U.S., would be relevant witnesses on issues relating to the commercial sale transaction between the parties:


- (a) Laura Titus was Solae's customer service representative for the Hershey account. The nature of Ms. Titus' involvement has been referred to above. Ms. Titus ceased being employed at Solae in August 2006; at that time she returned to her prior state of Indiana where she currently resides.
- (b) Lisa Affunti is employed in the accounting department of Solae. The nature of Ms. Affunti's involvement was referred to above. Ms. Affunti is employed at the Solae headquarters in St. Louis, Missouri and Ms. Affunti has informed me that she resides in St. Louis County, Missouri.
- (c) Kim McLucas was employed as a purchasing agent in the purchasing department of Hershey in Hershey, Pennsylvania. As mentioned above, Ms. McLucas was the Hershey contact with whom I negotiated the SOLEC Supply Agreement for the supply of SOLEC to Hershey and Hershey Canada facilities in 2006. As far as I know, Ms. McLucas is still employed at Hershey headquarters in Hershey, and as far as I can recall, Ms. McLucas also resides in Hershey, Pennsylvania (Hershey, Pennsylvania is less than 100 miles from the Court in Delaware where Solae has commenced the U.S. legal proceeding in respect of this subject matter).
- (d) I was involved in the formation of the SOLEC Supply Agreement as described above. I am employed at the headquarters of Solae in St. Louis and I reside in St. Louis.

## PREJUDICE TO SOLAE IF ACTION IS CONDUCTED IN ONTARIO

## ACCEPTANCE OF JURISDICTION OF DELAWARE

37. I am swearing this affidavit in support of a motion by Solae for an order staying this action.

A Notary Public or Commissioner for  
taking Affidavits in and for the State of  
Missouri, in the United States of America

  
SHERI P. WEST  
Notary Public -- Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires: July 31, 2009  
Commission # 05403515

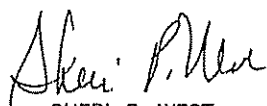
David L. Narkiewicz  
Licensed Attorney, Solar, LLC


# EXHIBIT 1

18

This is Exhibit.....1.....referred to in the  
affidavit of.....Tamie Cradick.....  
sworn before me, this.....  
day of.....April.....19.....2007.....

\*\*\*\*\*  
A COMMISSIONER FOR TAKING AFFIDAVITS

  
SHERI P. WEST  
Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires: July 31, 2009  
Commission # 05403515

  
DAVID L. NARKIEWICZ,  
Licensed Attorney,  
Solar, LLC

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AO 85 (Rev. 8/98) Notice, Consent, and Order of Reference—Exercise of Jurisdiction by a United States Magistrate Judge

## UNITED STATES DISTRICT COURT

District of \_\_\_\_\_

Plaintiff  
V.NOTICE, CONSENT, AND ORDER OF REFERENCE—  
EXERCISE OF JURISDICTION BY A UNITED STATES  
MAGISTRATE JUDGE

Case Number: 07-140

Defendant

NOTICE OF AVAILABILITY OF A UNITED STATES MAGISTRATE JUDGE  
TO EXERCISE JURISDICTION

In accordance with the provisions of 28 U.S.C. §636(c), and Fed.R.Civ.P. 73, you are notified that a United States magistrate judge of this district court is available to conduct any or all proceedings in this case including a jury or nonjury trial, and to order the entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

You may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge shall be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of this district court.

## CONSENT TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with provisions of 28 U.S.C. §636(c) and Fed.R.Civ.P. 73, the parties in this case consent to have a United States magistrate judge conduct any and all proceedings in this case, including the trial, order the entry of a final judgment, and conduct all post-judgment proceedings.

Party Represented	Signatures	Date
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

## ORDER OF REFERENCE

IT IS ORDERED that this case be referred to \_\_\_\_\_  
United States Magistrate Judge, to conduct all proceedings and order the entry of judgment in accordance with 28 U.S.C. §636(c) and Fed.R.Civ.P. 73.

Date	United States District Judge
_____	_____

NOTE: RETURN THIS FORM TO THE CLERK OF THE COURT ONLY IF ALL PARTIES HAVE CONSENTED  
ON THIS FORM TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

SOLAE, LLC,  
a Delaware limited liability company,

Plaintiff,

vs.

HERSHEY CANADA, INC.,  
a Canadian corporation,

Defendant.

C.A. No. 07 - 140

JURY TRIAL DEMANDED

FILED  
U.S. DISTRICT COURT  
DISTRICT OF DELAWARE  
MAR -9 PM 4:22

COMPLAINT

COMES NOW Plaintiff Solae, LLC ("Solae"), by and through its undersigned counsel, and for its Complaint against Defendant Hershey Canada, Inc. ("Hershey") states as follows:

NATURE OF THIS ACTION

1. This is a civil action for declaratory relief, for breach of contract, and for associated relief. Plaintiff Solae seeks a determination of the parties' respective rights and obligations arising from the sale of two lots of lecithin manufactured by Solae for Hershey's use at its facility in Smith Falls, Ontario, Canada. Defendant Hershey has demanded of Solae full payment, irrespective of contract limitations, arising from Hershey's use of one lot of Solae lecithin allegedly contaminated with *Salmonella* and the alleged consequences of that use. Hershey has also wrongfully terminated its contract



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of purchase and refused to pay for a second lot of lecithin manufactured and supplied at Hershey's request.

PARTIES

2. Plaintiff Solae is a Delaware limited liability company with its principal place of business in St. Louis, Missouri.

3. Defendant Hershey is a Canadian corporation with its principal place of business in Mississauga, Ontario.

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, in that this dispute arises in whole or in part under the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), to which both the United States and Canada are parties and signatories. This dispute thus presents federal questions within this Court's jurisdiction.

5. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a), in that this dispute is between a citizen of a state and a citizen of a foreign state, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

7. This Court has personal jurisdiction over Hershey, as Hershey, among other things, agreed to a forum selection clause which governs the transactions at issue and which provides that courts of Delaware shall have exclusive jurisdiction over this dispute.

FACTS

8. Solae produces soy lecithin, a combination of phospholipids naturally occurring in soybeans that can be used in its natural state or refined for use in a variety of finished consumer goods. Food manufacturers and producers, such as Hershey, purchase lecithin for use as an emulsifier.

9. On or about June 21, 2006, in accordance with an established sales relationship, Hershey submitted an order to Solae for the purchase of a specific quantity of soy lecithin ("Lot 1"). A page of this order purports to contain terms and conditions. These purported terms and conditions specify that the Hershey order "is not a firm offer . . . ."

10. On or about June 22, 2006, Solae transmitted an order confirmation to Hershey, acknowledging receipt of the Hershey order for Lot 1 ("Lot 1 Order Confirmation"). The Solae Lot 1 Order Confirmation contains conditions of sale, setting forth the terms that would govern the transaction ("Conditions of Sale").

11. The Conditions of Sale specify that they "contain[ ] all of the terms and conditions with respect to the purchase and sale of the Products sold hereunder." Conditions of Sale, ¶ 18.

12. The Conditions of Sale prescribe conditions whereby its terms might be rejected or accepted. They provide: "Unless Buyer shall notify Seller in writing to the contrary as soon as practicable after receipt of this Agreement by Buyer, Buyer shall be deemed to have accepted the terms and conditions hereof and, in the absence of such

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notification, Buyer's acceptance of the Products shall be equivalent to Buyer's assent to the terms and conditions hereof." Conditions of Sale, ¶ 18.

13. Solae received no such "writing to the contrary."

14. The Conditions of Sale specify, and limit, Solae's liability in the event of a breach or defect. Among other terms, they provide: "Buyer's exclusive and sole remedy for any claim shall be a refund of the amount of the purchase price paid for the product in respect of which damages are claimed, and in no event shall seller's liability for any claim be greater than that amount." Conditions of Sale, ¶ 4.

15. Solae processed Hershey's order of Lot 1. On or about June 27, 2006, Solae shipped Lot 1 from its facility in Gibson City, Illinois, to a Hershey facility in Smith Falls, Ontario.

16. Included with Solae's shipment of Lot 1 was an invoice, again containing the Conditions of Sale.

17. Hershey accepted the shipment of Lot 1 and rendered payment in full, and without objection to or rejection of the Conditions of Sale.

18. On or about October 17, 2006, Hershey submitted an order to Solae for purchase of a second lot soy lecithin ("Lot 2").

19. On or about October 18, 2006, Solae transmitted an order confirmation to Hershey, acknowledging receipt of the Hershey order for Lot 2 ("Lot 2 Order Confirmation"). The Lot 2 Order Confirmation contained the Conditions of Sale.

20. The purchase price of Lot 1 and Lot 2 combined totals in excess of \$75,000.

21. On or about November 13, 2006, Solae received word from Hershey that *Salmonella* had been discovered at Hershey's Smith Falls facility, resulting in shutdown of production and a product recall. Hershey asserted that the Lot 1 lecithin acquired from Solae was the source of the *Salmonella*, and that Hershey would "hold Solae responsible for all losses suffered as a result of this incident."

22. On or about December 8, 2006, Hershey notified Solae that it was terminating the Lot 2 order and would neither accept delivery nor pay for the goods already manufactured.

23. From December 2006 through February 2007, Solae made further attempts to gain Hershey's acceptance of the Lot 2 lecithin manufactured specifically for Hershey, to no avail.

#### COUNT I

#### DECLARATORY JUDGMENT

[Liability Regarding Lot 1 Under the United Nations Convention on Contracts for the International Sale of Goods ("CISG")]

24. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

25. Solae seeks a judicial determination that the transaction between the parties for Lot 1 is governed by the Conditions of Sale, which, by their terms, limit any Solae liability for amounts claimed by Hershey to no more than the purchase price paid for Lot 1.

26. An actual and justiciable controversy exists between the parties concerning the parties' respective rights and obligations with respect to damages and

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costs claimed by Hershey. Hershey seeks to "hold Solae responsible for all losses suffered as a result of this incident." Solae disputes Hershey's legal right to do so. Issuance of the relief requested will resolve this existing controversy.

27. The CISG applies, with exceptions not material here, to contracts for sale of goods between parties whose places of business are in different states that are parties to the CISG. For purposes of the CISG countries are "states." Both the United States and Canada are participating "state" signatories to the Convention.

28. The CISG governs formation of the contract between Solae and Hershey and the rights and obligations of Solae and Hershey arising there under. The CISG provides the governing body of law for transactions it governs.

29. By the CISG's terms, the Lot 1 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

30. Under the Conditions of Sale, Hershey's recovery for any claimed damages is limited to "a refund of the amount of the purchase price paid for the product in respect of which damages are claimed."

31. Solae is entitled to a declaration that under governing law, Solae is required to pay no more than the purchase price of Lot 1 if found liable for Hershey's damages and costs.

## COUNT II

### DECLARATORY JUDGMENT [Liability Regarding Lot 1 Under Delaware Law]

32. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

33. By way of alternative pleading, Solae states that, should the CISG not apply in whole or part, Delaware law applies pursuant to the parties' agreement, as set forth in the Conditions of Sale that govern the Lot 1 transaction.

34. Solae seeks a judicial determination that under Delaware law the Lot 1 transaction between the parties is governed by the Conditions of Sale which, by their terms, limit any Solae liability for amounts claimed by Hershey to no more than the purchase price paid for Lot 1.

35. An actual and justiciable controversy exists between the parties concerning the parties' respective rights and obligations with respect to the damages and costs claimed by Hershey. Hershey seeks to "hold Solae responsible for all losses suffered as a result of this incident." Solae disputes Hershey's legal right to do so. Issuance of the relief requested will resolve this existing controversy.

36. The Lot 1 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

37. Under the Conditions of Sale, Hershey's recovery for any claimed damages is limited to "a refund of the amount of the purchase price paid for the product in respect of which damages are claimed."

38. Solae is entitled to a declaration that under governing law, Solae is required to pay no more than the purchase price of Lot 1 if found liable for Hershey's damages and costs.

COUNT III

DECLARATORY JUDGMENT

[Liability Regarding Lot 2 Under the United Nations Convention on Contracts for the International Sale of Goods]

39. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

40. Solae seeks a judicial determination that the transaction between the parties for Lot 2 is governed by the Lot 2 Order Confirmation and Conditions of Sale which, under the CISG, contain the terms and conditions that govern the Lot 2 transaction.

41. An actual and justiciable controversy exists between the parties as Hershey violated the CISG by failing to pay the price for the Lot 2 goods it ordered on the date fixed by and determinable from the contracts of purchase without the need for request by Solae.

42. By the CISG's terms, the Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

43. Solae is entitled to a declaration that under CISG law the Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

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COUNT IV

**DECLARATORY JUDGMENT**  
**[Liability Regarding Lot 2 Under Delaware Law]**

44. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

45. By way of alternative pleading, Solae states that, should the CISG not apply in whole or part, Delaware law applies pursuant to the parties' agreement, as set forth in the Conditions of Sale that govern the Lot 2 transaction.

46. An actual and justiciable controversy exists between the parties regarding the terms and conditions that govern the Lot 2 transaction.

47. The Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

48. Solae is entitled to a declaration that under Delaware law that the Lot 2 Order Confirmation and Conditions of Sale constitute the parties' agreement governing this transaction.

COUNT V

**BREACH OF CONTRACT**  
**[Liability Regarding Lot 2 Under the United Nations Convention on Contracts for the International Sale of Goods]**

49. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

50. Hershey agreed to purchase Lot 2.

51. Hershey breached the Conditions of Sale by wrongfully terminating the contract of purchase and refusing to pay for Lot 2.



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52. Hershey violated the CISG by failing to pay the price for the goods it ordered per the terms of the contract of purchase.

53. Hershey violated the CISG by failing to pay the price for the goods it ordered on the date fixed by and determinable from the contracts of purchase without the need for request by Solae.

54. As a direct and proximate cause of Hershey's wrongful termination and breach regarding Lot 2, Solae has been damaged through the loss of business and profit.

55. Under governing law, Hershey's wrongful termination and refusal to pay for Lot 2 order entitles Solae to damages in an amount to be determined at trial.

#### COUNT VI

##### **BREACH OF CONTRACT**

[Liability Regarding Lot 2 Under Delaware Law]

56. Solae incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

57. Hershey violated Delaware law by failing to pay the price for the goods it ordered per the terms of the contract of purchase.

58. Hershey violated Delaware law by failing to pay the price for the goods it ordered on the date fixed by and determinable from the contracts of purchase without the need for request by Solae.

59. As a direct and proximate cause of Hershey's wrongful termination and breach regarding Lot 2, Solae has been damaged through the loss of business and profit.

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60. Under Delaware law, Hershey's wrongful termination and refusal to pay for Lot 2 order entitles Solae to damages in an amount to be determined at trial.

RELIEF

WHEREFORE, Solae respectfully prays for relief as follows:

- a. That the Court declare that the terms and conditions contained in the Conditions of Sale are the terms and conditions that govern the parties' transactions for both Lot 1 and Lot 2;
- b. That the Court declare that amounts to be paid by Solae to Hershey in connection with Lot 1, if any, are limited to no more than the purchase price paid by Hershey;
- c. That the Court find Hershey to have breached its agreement with Solae in declining to pay Solae for Lot 2;
- d. That Solae be awarded its reasonable attorneys' fees and costs as appropriate;
- e. That the Court grant such other and further relief as the Court may deem just and proper.


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JURY DEMAND

Solae demands a trial by jury on all issues so triable.

Respectfully submitted,

March 9, 2007

  
P. Clarkson Collins, Jr. (I.D. No. 739)  
Katherine J Neikirk (I.D. No. 4124)  
MORRIS JAMES LLP  
500 Delaware Avenue, Suite 1500  
P.O. Box 2306  
Wilmington, Delaware 19899  
(302) 888-6800  
(302) 571-1750 (fax)  
pcollins@morrisjames.com  
kneikirk@morrisjames.com

Scott L. Winkelman  
Monica M. Welt  
CROWELL & MORING LLP  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2595  
(202) 264-2500

Attorneys for Plaintiff Solae, LLC

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JS 44 (Rev. 11/04)

# CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**1.(2) PLAINTIFFS**

SOLAE, LLC

## DEFENDANTS

HERSHEY CANADA, INC.

(b) County Of Residence Of First Listed Plaintiff New Castle County, DE  
(EXCEPT IN U.S. PLAINTIFF CASES)

County Of Residence Of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

(c) Attorneys (Firm Name, Address And Telephone Number)

P. Clarkson Collins, Jr. (#739)

Katherine J. Neikirk (#4129)

**Morris James LLP**

500 Delaware Avenue, P.O. Box 2306

Wilmington, DE 19899-2306

(302) 888-6800

## II. BASIS OF JURISDICTION. (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III-CITIZENSHIP OF PRINCIPAL PARTIES** (Place An "X" In One Box For Plaintiff  
(For Diversity Cases Only) And One Box For Defendant)

- |   | PTF                        | DEF                                   |  | PTF                                   | DEF                        |
|---|----------------------------|---------------------------------------|--|---------------------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1            | Incorporated or Principal Place of Business in this State                | <input checked="" type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2            | Incorporated <del>and</del> Principal Place of Business in Another State | <input type="checkbox"/> 5            | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input checked="" type="checkbox"/> 3 | Foreign Nation   | <input type="checkbox"/> 6            | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	SPORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Delinquent Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Property Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury Med. Malpractice <input type="checkbox"/> 365 Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC §§1 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other  <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 730 Labor/Management Reporting & Disclosure Act <input type="checkbox"/> 760 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl Ref Inc Security Act	<input type="checkbox"/> 412 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 SSA (1935ff) <input type="checkbox"/> 862 Black Lung (922) <input type="checkbox"/> 863 DIWC/DIWW (405(a)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 420 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Kickback Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 975 Customer Challenge 12 USC 3410 <input type="checkbox"/> 990 Other Statutory Actions <input type="checkbox"/> 991 Agricultural Acts <input type="checkbox"/> 992 Economic Stabilization Act <input type="checkbox"/> 993 Environmental Matters <input type="checkbox"/> 994 Energy Allocation Act <input type="checkbox"/> 995 Freedom of Information Act <input type="checkbox"/> 996 Appeal of Fed Determination Under Equal Access to Justice <input type="checkbox"/> 998 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	FEDERAL TAX SUITS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Easement <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities-Employment <input type="checkbox"/> 445 Amer. w/Disabilities-Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS Third Party 26 USC 7609		

## Y. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding    ☐ 2 Removed from State Court    ☐ 3 Remanded from State Court    ☐ 4 Reinstated or Reopened    ☐ 5 Transferred from another district (specify) \_\_\_\_\_    ☐ 6 Multidistrict Litigation    ☐ 7 Judge from Magistrate Jurisdiction

VI. CAUSE OF ACTION (Cite The U.S. Civil Statute under which you are filing. Do not cite jurisdictional statutes unless diversity):

28 U.S.C. § 1331; 28 U.S.C. § 1332

**Brief description of cause:** Declaratory Judgment, Breach of Contract

## VII. REQUESTED IN COMPLAINT

☐ CHECK IF THIS IS A CLASS ACTION  
UNDER F.R.C.P. 23

## DEMAND \$

CHECK YES only if demanded in complaint  
JURY DEMAND: ☒ YES ☐ NO

**VIII. RELATED CASE(S)** (See instructions)  
**IF ANY**

JUDGE

DOCKET NUMBER

DATE \_\_\_\_\_

MARCH 9, 2007

FOR OFFICE USE ONLY

SIGNATURE OF ATTORNEY OF RECORD

Kathleen J. Kunkel

RECEIPT #

AMOUNT

## APPLYING IFP

JUDGE

MAG. JUDGE

33

FILED  
U.S. DISTRICT COURT  
DISTRICT OF DELAWARE  
2007 MAR -9 PM 4:24

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

SOLAE, LLC,  
a Delaware limited liability company,

Plaintiff,

vs.

HERSHEY CANADA, INC.,  
a Canadian corporation,

Defendant.

C.A. No. 07 - 140

JURY TRIAL DEMANDED

PLAINTIFF'S RULE 7.1 DISCLOSURE STATEMENT

Plaintiff Solae, LLC submits the following in accordance with Federal Rule of

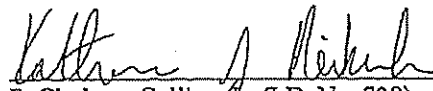
Civil Procedure 7.1:

- (1) Solae Holdings LLC is the sole member of Solae, LLC.
- (2) E.I. du Pont de Nemours and Company, and Bunge Holdings N.A., Inc. are the sole members of Solae Holdings LLC.
- (3) Publicly held companies that indirectly own ten percent (10%) or more of Solae, LLC are E.I. du Pont de Nemours and Company, and Bunge Ltd.

Dated: March 9, 2007

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MORRIS JAMES LLP



P. Clarkson Collins, Jr. (I.D. No. 739)

Katherine J. Neikirk (I.D. No. 4129)

500 Delaware Avenue, Suite 1500

P.O. Box 2306

Wilmington, Delaware 19899

(302) 888-6800

(302) 571-1750 (fax)

[pcollins@morrisjames.com](mailto:pcollins@morrisjames.com)

[kneikirk@morrisjames.com](mailto:kneikirk@morrisjames.com)

CROWELL & MORING LLP

Scott L. Winkelman

Monica M. Welt

1001 Pennsylvania Ave., N.W.

Washington, D.C. 20004-2595

Attorneys for Plaintiff Solae, LLC

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AO 440 (Del.Rev. 10/01) Summons In a Civil Action

UNITED STATES DISTRICT COURT

District of DELAWARE

SOLAE, LLC,

SUMMONS IN A CIVIL CASE

Plaintiff,

V.

CASE NUMBER: 07 - 140

HERSHEY CANADA, INC.,

Defendant.

TO: (Name and address of Defendant)

Hershey Canada, Inc.  
c/o Delaware Secretary of State  
401 Federal Street, Suite 3  
Dover, DE 19901

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

P. Clarkson Collins, Jr.  
Katherine J. Neikirk  
Morris James LLP  
500 Delaware Avenue, Suite 1500  
Wilmington, DE 19801

an answer to the complaint which is served on you with this summons, within Twenty (20) days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

PETER T. DALLEO

CLERK

3/9/07  
DATE

  
By (DEPUTY CLERK)

36

AO 440 (Del.Rev. 10/01) Summons in a Civil Action

UNITED STATES DISTRICT COURT

District of DELAWARE

SOLAE, LLC,

SUMMONS IN A CIVIL CASE

Plaintiff,

V.

CASE NUMBER:

07 - 140

HERSHEY CANADA, INC.,

Defendant.

TO: (Name and address of Defendant)

Hershey Canada, Inc.  
2350 Matheson Blvd. E  
Mississauga, Ontario, Canada L4W 5E9  
c/o Ministry of the Attorney General  
Courts Administration  
Court House (Provincial Division)  
393 Main Street  
Halleybury, Ontario, Canada P0J 1K0

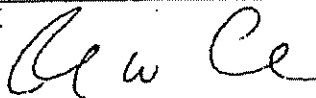
YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

P. Clarkson Collins, Jr.  
Katherine J. Neikirk  
Morris James LLP  
500 Delaware Avenue, Suite 1500  
Wilmington, DE 19801

an answer to the complaint which is served on you with this summons, within Twenty (20) days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

**PETER T. DALLEO**

CLERK



By (DEPUTY CLERK)

DATE


3/9/07




# EXHIBIT 2

This is Exhibit 2 referred to in the  
affidavit of Kenneth Cradick  
sworn before me, this  
day of April 19, 2007.

Notary Public for the State of Missouri  
A COMMISSIONER FOR TAKING AFFIDAVITS

  
SHERI P. WEST  
Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires: July 31, 2009  
Commission # 05403515

  
DAVID L. NARKIEWICZ  
Licensed Attorney, Solac, LLC

38

03/12/2007 09:38 FAX

0002/011

07-CV-329291PD2  
Court File No. \_\_\_\_\_

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**HERSHEY CANADA, INC.**

**Plaintiff**

**- and -**

**SOLAE, LLC**

**Defendant**

**STATEMENT OF CLAIM**

**TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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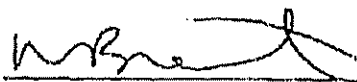
03/12/2007 09:37 FAX

0003/011

- 2 -

Date March 12, 2007

Issued by



Local registrar

(M. Brenton)

Address of 393 University Avenue  
court office Toronto, ON

TO: SOLAE, LLC  
1034 Danforth Drive  
St. Louis, Missouri 63102-1008  
U.S.A.

393 UNIVERSITY AVE.  
10TH FLOOR  
TORONTO, ONTARIO  
M5G 1E6

393 AVE. UNIVERSITY  
10E ÉTAGE  
TORONTO, ONTARIO  
M5G 1E6

MBDOCS, 3326D14.8

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03/12/2007 09:37 FAX

0004/011

- 3 -

#### CLAIM

1. The plaintiff claims:

- (a) damages in the amount of \$20,000,000 (or such further or other amount as this Honourable Court may deem just) for breach of contract, breach of warranty and negligence;
- (b) additional damages in an amount to be determined by this Honourable Court on account of lost profits and damage to the plaintiff's reputation and the value of its brands;
- (c) contribution and indemnity in respect of any third party claim for economic loss or personal injury that may be made against the plaintiff in connection with the events described below;
- (d) pre-judgment and post-judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended;
- (e) the costs of the action, together with applicable Goods and Services Tax; and
- (f) such further and other relief as the plaintiff may request and this Honourable Court may deem just.

#### THE PARTIES

2. The plaintiff, Hershey Canada, Inc. ("Hershey Canada"), is a company incorporated under the laws of Canada. Its corporate headquarters are in Mississauga, Ontario. Hershey Canada manufactures and distributes chocolate confectionery products.

3. Hershey Canada has a chocolate manufacturing facility located in Smiths Falls, Ontario (the "Chocolate Factory"). The Chocolate Factory produces a variety of chocolate products (the "Chocolate Products"). The Chocolate Products include food intermediates such as chocolate chips, baking chocolate and chocolate paste. The Chocolate Products also include a variety of finished chocolate bars and other confection products that are marketed

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under popular and valuable brand names like "Eat-More", "Glossette", "Hershey", "Lowney", "Oh Henry" and "Reese's".

4. The defendant, Solae LLC ("Solae"), is a company incorporated under the laws of the State of Delaware. Solae's corporate headquarters are in St. Louis, Missouri. Solae manufactures and distributes a full range of soy ingredient products used in food production, including "specialty lecithins". Those ingredients include a liquid soy lecithin product ("Solae Lecithin") that is used in the making of chocolate products. For many years, Solae has sold and delivered Solae Lecithin to Hershey Canada to be used by Hershey Canada in making its Chocolate Products.

#### THE CONTRACT FOR SOLAE LECITHIN

5. On or about January 10, 2006, Hershey Canada entered a contract with Solae for the purchase of 250,000 pounds of Solae Lecithin (the "Contract"). The Contract was for the delivery of the Solae Lecithin to be used by Hershey Canada in making its Chocolate Products at the Chocolate Factory.

6. The Contract is governed by the laws of Ontario. The Contract required that Solae deliver Solae Lecithin that conformed to Hershey Canada's specifications. The Contract also required that the Solae Lecithin would be fit for Hershey Canada's intended use and free from any defect.

#### THE DELIVERY OF CONTAMINATED SOLAE LECITHIN

7. On September 29, 2006, Solae delivered a substantial quantity of Solae Lecithin to Hershey Canada, under the Contract. Solae delivered the Solae Lecithin in eighteen sealed containers (the "Solae Containers"), each containing 1000 kilograms of Solae Lecithin. The Solae Containers had been sealed by Solae prior to delivery.

8. On October 15, 2006, Hershey Canada began using the Solae Lecithin on its "Symphony" production line at the Chocolate Factory (the "Symphony Line").

9. On November 1, 2006, Hershey Canada discovered Salmonella in chocolate that had been produced on the Symphony Line on October 28, 2006. The Salmonella was discovered

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as a result of Hershey Canada's regular quality control procedures. On finding Salmonella present, Hershey Canada ceased production on the Symphony Line.

10. The presence of Salmonella in food products is a very serious human health risk. Salmonella is a bacteria that causes an infection in the intestinal tract known as Salmonellosis. The infection results in illness and can have progressively more serious health consequences including death. The elderly, infants, and those with impaired immune systems are at greater risk from Salmonella. Section B.04.012 of the Canadian Food and Drug Regulations, C.R.C. c.870, specifically prohibits the sale of any chocolate product that is not Salmonella-free.

11. After finding Salmonella present, Hershey Canada conducted testing to identify the source of the Salmonella and the potential dispersion of the Salmonella within the Chocolate Factory and in the Chocolate Products made there. This testing revealed that the Solae Lecithin delivered in the sealed Solae Containers on September 29, 2006 was the source of the Salmonella.

12. As a result of its findings, Hershey Canada notified the Canadian Food Inspection Agency ("CFIA"), which is responsible for the enforcement of the Food and Drug Regulations.

13. Hershey Canada shut down the Chocolate Factory. It also quarantined thousands of Chocolate Products and laid off hundreds of its employees.

14. On November 11, 2006, in conjunction with the CFIA, Hershey Canada issued a recall of millions of units of Chocolate Products made at the Chocolate Factory between October 15 and November 9, 2006.

15. Hershey Canada also conducted further testing. This included the testing of samples from Solae Containers sealed by Solae prior to delivery and unsealed in the presence of Solae representatives. This testing confirmed that the Solae Lecithin delivered by Solae on September 29, 2006 was the source of the Salmonella.

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**SOLAE BREACHED ITS OBLIGATIONS**

16. In selecting Solae as a supplier, Hershey Canada chose a company that specializes in the supply of food additives. Solae is an experienced global manufacturer of food additives and does business in more than 100 countries. It has 3500 employees worldwide and its annual sales exceed USD\$1,000,000,000. Solae's stated long-term aim is to *"incorporate great-tasting, value-added specialty food ingredients into the world's menu every day in meat products, beverages, cereals and processed foods in general"*. Solae has publicly stated that it *"pays close attention to Hazards Analysis and Critical Control Points"* in order to control the risk of product contamination, so that its customers *"get a product that is safe and produced to agreed-upon standards and specifications"*. As Solae states on its website: *"At the Solae Company, we look at quality from all angles - functionality, safety, purity, ingredients, consistency, manufacturing, customer service, technical support and many more - to ensure that our customers are never disappointed."*

17. Solae promised Hershey that it would deliver Solae Lecithin that was fit for its intended use in the making of Chocolate Products, and that was free of Salmonella. As a global manufacturer of food additives, Solae understands the critical importance of food safety. Solae has the financial and technical resources necessary to meet its commitments relative to food safety. Hershey Canada reasonably expected Solae to meet those commitments and Hershey Canada relied upon Solae to do so.

18. By supplying Solae Lecithin that was contaminated with Salmonella, Solae breached the Contract. This breach was a clear violation of the Canadian *Food and Drugs Act*, R.S.C. 1985 c.F-27, and was a fundamental breach going to the root of the Contract.

19. Solae knew that the Solae Lecithin would be used by Hershey Canada in making its Chocolate Products at the Chocolate Factory. Solae also knew or ought to have known that Canadian law prohibits the sale of chocolate products that are not Salmonella-free. Solae owed a duty of care to Hershey to ensure that it supplied Solae Lecithin that was free of Salmonella. In failing to ensure that the Solae Lecithin was free of Salmonella, Solae breached its duty of care to Hershey Canada.



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20. Solae was negligent. By permitting the introduction of Salmonella into the Solae Lecithin and by failing to detect the presence of Salmonella in the Solae Lecithin, Solae's actions fell below the applicable standard of care. Further particulars of the negligent acts or omissions of Solae are known only to Solae.

#### HERSHEY CANADA'S DAMAGES

21. Hershey Canada has suffered serious and material losses as a direct consequence of Solae's breach of its legal obligations. In particular, Hershey Canada has suffered and will continue to suffer damages related to:

- (a) investigating to determine the source and dispersion of the Salmonella;
- (b) implementing the quarantine and recall of Chocolate Products, including,
  - (i) storing and disposing of adulterated Chocolate Products;
  - (ii) travel and lodging expenses for employees;
  - (iii) the opportunity cost of diverted employee time;
  - (iv) the cost of third party consultants and contractors; and,
  - (v) public relations and customer and consumer relations costs;
- (c) disposing of all intermediate and finished Chocolate Products and other materials in the Chocolate Factory, including related costs and lost profits;
- (d) increased costs, fees and penalties assessed by customers, suppliers and government agencies as a result of the recall and the shutdown of Chocolate Factory;
- (e) the cost of cleaning, rehabilitating and re-starting the Chocolate Factory;
- (f) loss of profits on Chocolate Products that could not be manufactured during the shutdown of the Chocolate Factory;

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(g) loss of profits as a result of the damage done to Hershey Canada's reputation and brands; and

(h) the cost of remedial marketing and promotional activities undertaken following the recall.

22. In addition, Hershey Canada faces potential claims from its downstream customers related to their costs of responding to the recall and their corresponding loss of profits.

23. Hershey Canada may also face potential claims for damages from individuals who have eaten Chocolate Products contaminated with Salmonella.

24. Further particulars of Hershey Canada's damages will be provided prior to trial.

#### SERVICE OUTSIDE ONTARIO

25. In serving this claim on Solne outside of Ontario, the plaintiffs rely upon Rule 17.02 of the Ontario *Rules of Civil Procedure*, and upon the following material facts:

- (a) the breach of the Contract was committed in Ontario;
- (b) the claim involves a tort committed in Ontario; and
- (c) damage has been sustained by Hershey Canada in Ontario.

#### PLACE OF TRIAL

26. Hershey Canada proposes that this action be tried at Toronto, Ontario.

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March 12, 2007

McMILLAN BINCH MENDELSON LLP  
Barristers and Solicitors  
BCE Place, Suite 4400  
Bay Wellington Tower, 181 Bay Street  
Toronto, Ontario  
M5J 2T3

Scott Maidment  
LSUC#: 33797R  
Tel: 416.865.7911  
Fax: 416.865.7048

Teresa Dufort  
LSUC#: 23677J  
Tel: 416.865.7145  
Fax: 416.865.7048

Solicitors for the Plaintiff

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07-CV-32929/PD 2

Court File No: »

HERSHEY CANADA, INC. Plaintiff and SOLAE LLC Defendant

ONTARIO  
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

McMILLAN BINCH MENDELSON LLP  
Barristers and Solicitors  
BCE Place, Suite 4400  
Bay Wellington Tower, 181 Bay Street  
Toronto, Ontario  
M5J 2T3

Scott Maidment  
LSUC#: 33797R  
Tel: 416.865.7911  
Fax: 416.865.7048

Teresa Dufort  
LSUC#: 23677J  
Tel: 416.865.7145  
Fax: 416.865.7048

Solicitors for the Plaintiff

04/11/011

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# EXHIBIT 3

48

This is Exhibit 3 referred to in the  
affidavit of Tamara Lindrick  
sworn before me, this  
day of April, 17, 2007.

A COMMISSIONER FOR TAKING AFFIDAVITS

*Sheri P. West*  
SHERI P. WEST  
Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires: July 31, 2009  
Commission # 05403515

*David L. Markiewicz*  
DAVID L. MARKIEWICZ  
Licensed Attorney, Solac, LLC

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HERSHEY PRODUCT. OFFICE

06/21/08

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Hershey Canada, Inc.

A Subsidiary of / une filiale de  
The Hershey Company

Invoice To/ THE HERSHEY COMPANY  
 Facturer à: DISBURSEMENTS DEPARTMENT  
 PO BOX 806 - 100 CRYSTAL A DR  
 HERSHEY PA 17033-0806

Vendor / 3008099  
 Fournisseur: THE SOLAE CO LLC  
 23091 NETWORK PLACE  
 CHICAGO, IL 60673-1217  
 USA

Vendor Phone/Tél: 800-348-0960  
 Vendor Contact/Représentant: AMY  
 Date/Date:

Vendor Contract/  
 Contrat de Fournisseur:  
 Terms/Conditions de Paiement: Within 30 days Due net

Purchase Order/Bon d'Achat 4500257993

Page 1  
 Date 06/21/2006

The Purchase order number and product code must appear on all invoices, correspondence, packing slips, etc. Packing slip must be included with all shipments. Le numéro de bon de commande ainsi que le numéro de produit doivent figurer sur toute correspondance, factures, bons de connaissance, etc. Le bon connaissance doit être inclus avec tout envoi.

Terms and Conditions on Reverse / Modalités au Verso

Ship To / ~~Smiths Falls Plant~~ *WILLS warehouse*  
 Expédier à: ~~Hershey Canada Inc.~~ *Hwy 15 south*  
~~1 Hershey Drive~~ *Smiths Falls, ON*  
~~Smiths Falls, ON K7A 1T8~~  
*Appt: (613) 283-5194*

Incoterms/Incoterms: FOB DESTINATION  
 Contact: James Kuehl ex353

Phone/Tél: 613 283-3300  
 Fax: (613) 283-4844

Currency/Monnaie: USD

Item/Article	Quantity/Quantité	Unit	Sub No/Code de Produit	Price/Prix	Amount/Montant
00010	39,682.800	Pound	1-00768-000 Lecithin, Soy, Identity Preserved	125.65 100/LB	49,861.44

Delivery date: 09/29/2006  
 RELEASE AGAINST CONTRACT 46044618  
 ITEM ON CONTRACT 00010

*(18 x 1000 kg totes)*

*Material code  
 10005325*

Material must meet most recent Hershey Foods Corporation specifications.

*234990*

*Our next order.*

*JK*

The above prices on this purchase order excludes the Goods and Services Tax (GST) and Quebec Sales Tax (QST).

All correspondence, including acknowledgements, quotations and invoices must indicate the following:

- 1) Vendor GST and/or QST registration number
- 2) The GST and/or QST item tax status
- 3) The GST and/or QST separately by each line item
- 4) Total GST and/or QST amount of the invoice

Total Amount/Montant Total: USD 49,861.44

Dans le prix indiqué ci-dessus dans le bon de commande, la taxe sur les produits et services (TPS) et la taxe de vente du Québec (TVQ) ne sont pas comprises.

Toute la correspondance, y compris les accusés de réception, les propositions de prix et les factures doivent mentionner les renseignements suivants:

- 1) Le numéro d'enregistrement du fournisseur pour la TPS et/ou TVQ
- 2) La situation fiscale de l'article en ce qui concerne la TPS et/ou TVQ
- 3) Le montant de la TPS et/ou TVQ séparé pour chaque article de la gamme
- 4) Le montant de la TPS et/ou TVQ pour la facture

Ontario retail sales tax exempt vendor permit No. 1233-6386  
 No. 1233-6386 d'exemption de taxe de vente au détail de l'Ontario

# EXHIBIT 4



50

This is Exhibit 4 referred to in the  
affidavit of Lanise Cradick  
sworn before me, this  
day of April 18, 2007

NOTARY PUBLIC  
A COMMISSIONER FOR TAKING AFFIDAVITS

*Sheri P. West*  
SHERI P. WEST  
Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires: July 31, 2009  
Commission # 05403515

*David L. Narkiewicz*  
DAVID L. NARKIEWICZ  
Licensed Attorney, SoLa, LLC

51

*The Solae<sup>32</sup>  
Company.*

**Order  
Confirmation  
234910**

**Shipping Address**

HERSHEY CANADA, INC.  
C/O WILLS WAREHOUSE  
HWY 18 SOUTH  
SMITH FALLS ON K7A 4T6  
CANADA

**Bill-to Party Address**

HERSHEY CANADA SMITH FALLS PLT  
1 HERSHEY DRIVE  
SMITH FALLS ON K7A 4T6  
CANADA

**Information**

**Document Date** 21 Jun 2006  
**Purchase Order No.** 4500257993  
**Purchase Order Date**  
**Incoterms** FOB Shippoint; Frt. PPD/Divd  
**Payment Terms** 30 days from invoice date  
**Freight Terms** Freight Included in the Price

22 Jun 2006 01:04:24

Page 2 of 2

**Sales Order Details**

Item	Material Description	Conf. Date	Quantity	Net Weight	Gross Weight	Unit Price	Amount
0010	10005325 SOLEC 3F-UB-IP Standard Soy Lecithin Fluid 1,000 KG ST CAGE Cust. Material No.: 1-00768-000	00/20/2006	18 IBC	18,000.000 KG	18,242 KG	2.7701 /KG	49.861.60
						<b>Total Amount</b> USD	49.861.60
Please fax order confirmation James Kuehl at (813) 283-4844.							

Created By: Laura Titus

Shipping Plant: VX07 Gibson City Plant

Price shall be the price in effect on the date of shipment.

Prices reflected in the order confirmation are subject to change.

Please see Attachment 1 - Conditions of Sale on reverse side.

If you have any questions regarding this invoice please contact Financial Services at 1-800-325-7108 extension 3468.

Solae, LLC  
P.O. Box 68940  
St. Louis, Missouri 63168  
(314) 982-1989 Tel (800) 325-7108 Toll Free

Solae, LLC  
1634 Danforth Drive  
St. Louis, Missouri 63102

NOI 03NNNO BUSY RASIMILE CONNCTION

REASON FOR HAND UP OR LINE FALL

TRANSMITTED/STORED JUN 23, 2006 9:34AM  
FILE MODE  
OPTION ADDRESS 916132834844  
RESULT OK  
PAGE 1/1  
TTL SOLAE LLC-CS

\* \* \* COMMUNICATION RESULT REPORT ( JUN 23, 2006 9:41AM ) \* \* \*

P. 1

# EXHIBIT 5

52

This is Exhibit 5 referred to in the  
affidavit of Laurie C. Adams  
sworn before me, this  
day of April, 2007.

A COMMISSIONER FOR TAKING AFFIDAVITS

*Sheri P. West*

SHERI P. WEST  
Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires July 31, 2009  
Commission # 054001

*D/L Markiewicz*

DAVID L. NARKIEWICZ  
Licensed Attorney, Solicitor, LLC

*The Solae<sup>oe</sup>  
Company.*

STRAIGHT BILL OF LADING  
SHORT FORM

ORDER # 234910  
DELIVERY # 80290104  
SHIPMENT # 0000137157  
Page 1 of 1

RECEIVED, subject to the classification and tariffs in effect on the date of the issue of this Bill of Lading.

AT GIBSON CITY, IL. DATE 27 Sep 2006 FROM Solae, LLC

(Mail or street address of Consignee - For purposes of notification only.)  
the property described below, in apparent good order, except as noted (contents and condition of contents of package unknown, marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, it on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classification in effect on the date thereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classification of tariff if this is a motor carrier shipment.  
Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

CONSIGNED TO  
HERSHEY CANADA, INC.  
C/O WILLS WAREHOUSE  
HWY 15 SOUTH

DESTINATION  
SMITH FALLS, ON K7A 4T6  
CA

ROUTING  
CFI CONCENTRATE CONTRACT  
4701 E 32ND ST  
JOPLIN, MO - 64803  
TEL: 800-641-4747

CUSTOMER PO #  
4500257993

FREIGHT TERMS  
FOB Shippoint; Frt. PPD/Divd  
PREPAID

DESTINATION PORT CONTAINER/TRAILER SEAL NUMBER  
25327 050599

CONFIRMED DELIVERY DATE SAIL DATE ETA DATE CUT-OFF DATE  
29 Sep 2006

BOOKING NUMBER VESSEL SHIP-TO NAME

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	FREIGHT CLASS	**WEIGHT (SUB. TO CORRECTION)
18 IBC	10005325 SOLEC 3F-UB-IP Standard Soy Lecithin Fluid 1,000 KG ST CAGE Cust. Material No.: 1-00768-000  TOTAL WEIGHT 42,421 LB TOTAL WEIGHT 19,242 KG	55	42,421 LB

This shipment is correctly described. Correct weight is \_\_\_\_\_ lbs. Subject to verification by the Western Weighing and Inspection Bureau in accordance with Agreement No. 4560, Eastern Weighing and Inspection Bureau in accordance with Agreement No. 18654, Southern Weighing and Inspection Bureau in accordance with Agreement No. 18654, Transcontinental Freight Bureau in accordance with Agreement No. A-3973. (Shippers imprint in lieu of stamp, not a part of Bill of Lading approved by the Interstate Commerce Commission).

Foodgrade articles,  
Do not ship with  
chemicals, toxic or  
odorous substance

\* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "Carrier's or shipper's weight."  
NOTE - Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property, the agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding \_\_\_\_\_ Per \_\_\_\_\_

Solae, LLC, Shippers \_\_\_\_\_ Agent

Per SHIPPER LOAD/CONSIGNEE UNLOAD

Per CARRIER INSTRUCTIONS

Solae, LLC  
124 State Route 47  
Gibson City IL 60936

Delivery appt required - call Keith or Mike @ (613) 283-5194 or 613-283-9043. Receiving hours are 8 am to 4:30 pm. Delivery to Will Warehouse, Hwy 15, Smith Falls, Ontario) Driver should cross @ Detroit Windsor Bridge.

Solae, LLC  
P.O. Box 88940  
St. Louis, Missouri 63188  
(314) 982-1983 Tel (800) 325-7108 Toll Free

Solae, LLC  
1034 Danforth Drive  
St. Louis, Missouri 63102

In Case of Transportation Emergency or Product Spill Contact CHEMTREC 1-800-424-9300 & the Shipper of the

**Delivery Note**  
**80290104**

HERSHEY CANADA, INC.  
C/O WILLS WAREHOUSE  
HWY 15 SOUTH  
SMITH FALLS ON K7A 4T6  
CANADA

HERSHEY CANADA SMITH FALLS PLT  
1 HERSHEY DRIVE  
SMITH FALLS ON K7A 4T8  
CANADA

Document Date	27 Sep 2006
Delivery Date	29 Sep 2006
Sales Order Number	234910
Customer Number	55188098
Purchase Order No.	4500257993
Purchase Order Date	
Incoterms	FOB Shippoint; Frt PPD/Dlvd

Pro Number		
Total Net Weight	18,000.000	KG
Total Gross Weight	19,242.000	KG

GXXI

1 of 1

Item	Material Description	Quantity	Net Weight
0010	10005325 SOLEC 3F-UB-IP Standard Soy Lecithin Fluid 1,000 KG ST CAGE Customer material number 1-00768-000 F430000208 F430000236  Container/Truck Nbr:  25327  Seal Nbr:  050599	1 IBC 17 IBC	1,000 KG 17,000 KG

Solae, LLC  
1034 Danforth Drive  
St. Louis, Missouri 63102

55

*The Solae<sup>®</sup>  
Company*

Page 1 of 1  
Date: 27 Sep 2006

# CERTIFICATE OF ANALYSIS

**Ship To:**  
HERSHEY CANADA, INC.  
C/O WILLS WAREHOUSE  
HWY 15 SOUTH  
SMITH FALLS ON K7A 4T6  
CANADA

**Shipped From:**  
Gibson City Plant  
Solae, LLC  
124 State Route 47  
Gibson City IL 60936

**Material:**  
10005325  
SOLEC 3F-UB-IP  
Standard Soy Lecithin Fluid  
1,000 KG ST CAGE  
1-00768-000


**Order / Item  
Delivery / Item**  
234910 / 000010  
80290104 / 900002

**Batch / Quantity**  
F430000236 / 17,000 KG  
Date of Manufacture: 24 Jun 2006

**P.O. No.**  
4500257993

Characteristic	Value
Acetone Insolubles	63.0 %
Acid Value	26.0 mg/g
Color, Gardner	16.7
Hexane Insoluble	0.00 %
Karl Fischer Moisture	0.40 %
Viscosity	5950.0 CPOISE
Best Before	24 Dec 2007

Quality Manager:  
Carl Sayre



The results certified above are based upon Standard Methods and may be derived from either actual laboratory analyses, rapid measurement technology, statistically defined sampling plan results, or through correlation studies. Solae, LLC guarantees the product you receive meets the qualities certified.

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*The Solae<sup>LLC</sup>  
Company*Page 1 of 1  
Date: 27 Sep 2006

## CERTIFICATE OF ANALYSIS

**Ship To:**  
HERSHEY CANADA, INC.  
C/O WILLS WAREHOUSE  
HWY 15 SOUTH  
SMITH FALLS ON K7A 4T6  
CANADA

**Shipped From:**  
Gibson City Plant  
Solae, LLC  
124 State Route 47  
Gibson City IL 60936

**Material:**  
10005325  
SOLEC 3F-UB-IP  
Standard Soy Lecithin Fluid  
1,000 KG ST CAGE  
1-00768-000

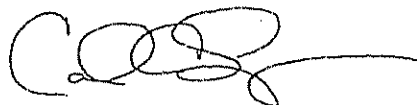
**Order / Item:**  
**Delivery / Item:**  
234910 / 000010  
80290104 / 900001

**Batch / Quantity:**  
F430000208 / 1,000 KG  
Date of Manufacture: 28 Nov 2005

**P.O. No.:**  
4500257993

Characteristic	Value
Acetone Insolubles	64.0 %
Acid Value	28.0 mg/g
Color, Gardner	16.6
Hexane Insoluble	0.01 %
Karl Fischer Moisture	0.80 %
Viscosity	10000.0 CPOISE
Best Before	28 May 2007

Quality Manager:  
Carl Sayre



The results certified above are based upon Standard Methods and may be derived from either actual laboratory analyses, rapid measurement technology, statistically defined sampling plan results, or through correlation studies. Solae, LLC guarantees the product you receive meets the qualities certified.



# EXHIBIT 6

57

This is Exhibit 6 referred to in the  
affidavit of Lansi Craddock  
sworn before me, this  
day of April 19, 2007.

A COMMISSIONER FOR TAKING AFFIDAVITS

*Sheri P. West*  
SHERI P. WEST

Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County

My Commission Expires: July 31, 2009  
Commission # 05403515

*D/L Narkiewicz*

DAVID L. NARKIEWICZ

Licensed Attorney, Solo, LLC

58

*The Solae<sup>be</sup>  
Company.*

**Invoice**  
**90308495**

**Shipping Address**  
HERSHEY CANADA, INC.  
C/O WILLS WAREHOUSE  
HWY 16 SOUTH  
SMITH FALLS ON K7A 4T6  
CANADA

**Billing Address**  
HERSHEY CANADA SMITH FALLS PLT  
1 HERSHEY DRIVE  
SMITH FALLS ON K7A 4T6  
CANADA

**Conditions**  
Document Date 27 Sep 2006  
Billing Date 27 Sep 2006  
Purchase Order No. 4500257993  
Purchase Order Date  
Sales Order Number 234910  
Incoterms FOB Shippoint; Frt. PPD/Divd  
  
Payment Terms 30 days from invoice date  
Payment Due Date 27 Oct 2006  
**PLEASE REMIT TO:**  
SOLAE, LLC  
C/O BANK OF AMERICA  
P O BOX 169  
ST LOUIS, MO 63150-0169  
Page 1

Invoice Details							
Item	Material Description	Date Shipped	Quantity	Net Weight	Gross Weight	Unit Price	Amount
0010	10005325  SOLEC 3F-UB-IP Standard Soy Lecithin Fluid 1,000 KG ST CAGE Cust. Material No.: 1-00768-000 Country of Origin: US	09/27/2006	18 IBC	18,000.000 KG		2.7701 /KG	49,861.80
						<b>Total Amount</b>	<b>USD 49,861.80</b>
<b>Total Gross Weight</b>				<b>18,242 KG</b>			
Price shall be the price in effect on the date of shipment. Please see Attachment 1 - Conditions of Sale on reverse side.							

Solae, LLC  
P.O. Box 88940  
St. Louis, Missouri 63188  
(314) 982-1983 Tel. (800) 325-7108 Toll Free

Solae, LLC  
1034 Danforth Drive  
St. Louis, Missouri 63102

## ATTACHMENT 1 - CONDITIONS OF SALE

1. Unless otherwise indicated on the face of this Agreement, title, liability for and risk of loss to Product sold hereunder (the "Product") pass to Buyer upon loading for shipment at Seller's producing location.

2. Seller warrants only to Buyer that the Product delivered hereunder meets Seller's standard specifications for the Product as in effect on the date of shipment or such other specifications as may have been expressly agreed to herein. EXCEPT AS EXPRESSLY PROVIDED IN SECTION 6 HEREOF, SELLER MAKES NO EXPRESS OR IMPLIED WARRANTY (INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR ARISING FROM ANY COURSE OF DEALING OR TRADE USAGE) REGARDING THE PRODUCT. Buyer, having the expertise and knowledge in the intended use of the Product and any articles made therefrom, assumes all risk and liability for results obtained by the use of the Product, whether used alone or in combination with other materials.

3. Failure to give notice of claim within ninety (90) days from date of delivery, or the date fixed for delivery (in case of non-delivery), shall constitute a waiver by Buyer of all claims in respect of the Product so delivered or not delivered, as the case may be. No Product shall be returned to Seller without Seller's prior written permission, and then only in the manner prescribed by Seller. No claim shall be allowed for Product that has been processed in any manner. Any claims of Buyer may be set off by seller in any amounts due and payable to Seller. Claims include claims of any kind, including without limitation those (a) for loss, damage, expense or injury, (b) with respect to the Product delivered or for non-delivery of the Product, or (c) based upon Seller's (i) breach of warranty, contract, statute, or regulation or (ii) negligence, strict liability or any other tort.

4. BUYER'S EXCLUSIVE AND SOLE REMEDY FOR ANY CLAIM SHALL BE A REFUND OF THE AMOUNT OF THE PURCHASE PRICE PAID FOR THE PRODUCT IN RESPECT OF WHICH DAMAGES ARE CLAIMED, AND IN NO EVENT SHALL SELLER'S LIABILITY FOR ANY CLAIM BE GREATER THAN THAT AMOUNT.

5. NEITHER PARTY SHALL BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION OR ANY OTHER LOSS), WHETHER OR NOT CAUSED BY OR RESULTING FROM THE BREACH OF CONTRACT, NEGLIGENCE OR OTHER WRONGFUL ACT OR OMISSION OF SUCH PARTY EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

6. Seller warrants that the use or sale of the Product delivered hereunder will not infringe the claims of any validly issued United States patent covering the Product itself, but does not warrant against infringement due to: (a) the use of Products in combination with other products or materials or in the operation of any process, or (b) the compliance by Seller with any specifications provided to the Seller by Buyer.

7. No liability shall result from delay in performance or non-performance, directly or indirectly caused by circumstances beyond the control of the Party affected ("Force Majeure"), including, but not limited to Act of God, fire, explosion, flood, war, act of or authorized by any government, accident, labor trouble or shortage, equipment failure, inability to obtain from its usual sources of supply fuel, power, material, equipment or transportation or commercial impracticability. Quantities so affected may be eliminated from this Agreement without liability, but this Agreement shall remain otherwise unaffected. Seller shall have no obligation to purchase supplies of the Products specified herein to enable Seller to perform this Agreement.

8. It is understood and agreed between Buyer and Seller that if this Agreement covers Products that must be manufactured especially for Buyer and is suspended or terminated for any reason, Buyer will take delivery of and make payment for such Products as have been completed and such Products as are in process on the date notice of suspension or termination is received by Seller. If Buyer for any reason cannot accept delivery of such Products, Buyer will make payment therefor as though delivery has been made and Seller will store such Products for Buyer's account and at Buyer's expense.

9. If for any reason, including without limitation, Force Majeure, Seller is unable to supply the total demand for Products specified herein, Seller may distribute its available supply among any or all purchasers as well as business units, including affiliates and subsidiaries, of Seller on such basis as Seller may deem fair and practical without liability for any failure of performance that may result therefrom. Seller shall have no obligation to purchase Product to enable Seller to supply Buyer under this Agreement.

10. At Buyer's request, Seller may, at its option, furnish such technical information as Seller has available with respect to the use of the Products covered by this Agreement. Unless otherwise agreed in writing, all such technical assistance and information will be provided gratis, and Buyer assumes sole responsibility for results obtained in reliance thereon.

11. Buyer acknowledges that it has received and is familiar with Seller's labeling and literature concerning the Products and their properties. Buyer will forward such information to Buyer's employees and any others, including Buyer's customers, who may handle, process or sell such Products and advise such parties to familiarize themselves with such information.

12. Buyer shall reimburse Seller for all taxes, licenses, or other charges, by whatever name, (other than taxes based upon Seller's income) which Seller may be required to pay to any Government (National, Foreign, State or Local) upon the sale, production, or transportation of the Products sold hereunder.

13. In the event Buyer fails to fulfill Seller's terms of payment completely, or in case Seller shall have any doubt at any time as to Buyer's financial responsibility, Seller, without advance notice and at Seller's sole option, may decline to make further deliveries, except upon payment of all arrearages and receipt of cash in advance or delivery of security satisfactory to Seller.

14. This Agreement is not assignable or transferable by Buyer, in whole or in part, except with the prior written consent of Seller. This Agreement shall be binding upon the Parties, their successors and permitted assigns.

15. Failure by either Party to require performance by the other Party or to claim a breach of any provision of this Agreement shall not be construed as a waiver of any right arising under this Agreement, including the right to require subsequent performance or contest any subsequent breach.

16. If any term or provision of this Agreement shall be found to be invalid, illegal or unenforceable, this Agreement shall remain in full force and effect and such term or provision shall be deemed stricken. Seller and Buyer shall promptly agree upon a substitute for any such term or provision.

17. This Agreement is to be construed and the respective rights of Buyer and Seller are to be determined according to the laws of the State of Delaware, U.S.A., without regard to choice of law or conflicts principles of Delaware or any other jurisdiction, and the courts of Delaware shall have exclusive jurisdiction over any disputes or issues arising under this Agreement. The United Nations Convention on Contracts for the International Sale of Goods shall not govern this Agreement or the performance thereof or any aspect of any dispute arising therefrom.

18. This Agreement contains all of the terms and conditions with respect to the purchase and sale of the Products sold hereunder. Those terms and conditions supersede any of previous date and no modification thereof shall be binding on Seller unless separately contracted in writing and agreed to by a duly authorized representative of Seller. No modification shall be effected by the acknowledgment or acceptance of purchase order forms stipulating different conditions. Unless Buyer shall notify Seller in writing to the contrary as soon as practicable after receipt of this Agreement by Buyer, Buyer shall be deemed to have accepted the terms and conditions hereof and, in the absence of such notification, Buyer's acceptance of the Products shall be equivalent to Buyer's assent to the terms and conditions hereof.

# EXHIBIT 7

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This is Exhibit 7 referred to in the  
affidavit of Laurie Cradock  
sworn before me, this  
day of April 19, 2007

A COMMISSIONER FOR TAKING AFFIDAVITS

Sheri P. West  
SHERI P. WEST  
Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires: July 31, 2009  
Commission # 05403515

David L. Markiewicz  
DAVID L. MARKIEWICZ  
Licensed Attorney, SoLa, LLC

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Hershey Canada Inc. 2350 Matheson Blvd. East Mississauga, Ontario L4W 5E9				3008088 Tel: (717) 534-5657		NO. 01015428	
REFERENCE NUMBER	INVOICE NUMBER	INVOICE DATE	PURCHASE ORDER	COMMENTS	GROSS AMOUNT	DISCOUNT	NET AMOUNT
5100250272	90306495	09/27/2006	4500257993		49.863.80	0.00	49.863.80
PAYMENT DOCUMENT 2000301930						AMOUNT PAID	49.863.80



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Hershey Canada, Inc.

- and - Solac, LLC

Plaintiff

Defendant

Court File No.: 07-CV-329291PD2

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**AFFIDAVIT OF LAURIE CRADICK**  
(sworn April / 7 , 2007)**FASKEN MARTINEAU DUMOULIN LLP**  
Barristers and Solicitors  
Box 20, Suite 4200  
Toronto-Dominion Centre  
Toronto, ON M5K 1N6Robert S. Harrison (LSUC#14046D)  
Tel: 416 865 4384  
Peter J. Pliszka (LSUC#29634T)  
Tel: 416 868 3336Fax: 416 364 7813  
Solicitors for the Defendant